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May 17, 2000

The Honorable Vernon A. Williams
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures

Dear Sir:

Yesterday, we filed an original and 25 copies of the Comments of the State of Maryland in this proceeding. When we received the date-stamped copy back from our messenger, we discovered that during the course of copying the document, the pages had gotten out of order and that one page was missing from the document. Fortunately, we discovered this error in time to correct all of the service copies sent to all persons on the official Service List. However, the STB's offices had already closed for the day, and we were not able to file corrected copies with you at that time.

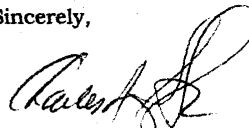
With this letter, I am enclosing the original and 25 copies of the Comments we filed yesterday, complete and with all pages in the correct order. I apologize for any inconvenience that this error in our original filing may have caused.

Please note that because we served all parties with a corrected document yesterday, I am not effecting service either of the Comments or of this letter. If you have any questions or would like to discuss this with me further, please do not hesitate to contact me at the above number.

The Honorable Vernon A. Williams
May 17, 2000
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Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Charles A. Spitalnik", with a stylized flourish at the end.

Charles A. Spitalnik
Counsel for the State of Maryland

Enclosures

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423



Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE STATE OF MARYLAND

The State of Maryland, by its undersigned counsel, hereby submits its Comments in response to the Order of this Board served on March 31, 2000 in this proceeding (the "*March 31 Order*"). Maryland submits that the Board's focus on the public interest requires modifications to the current merger policy and procedural rules. The current rules attempt to create a balance between the private and profit oriented objectives of carriers seeking to merge, and the interests of the shipping public. However, as has been demonstrated in recent merger proceedings, "public interest" has a broader reach, and the current rules are not sufficiently clear about the Board's mandate and authority to guard and protect those interests.

Maryland enjoys a unique geographical and economic position in the center of the mid-Atlantic region. It has one of the nation's largest and busiest ports. It has urban and suburban populations that rely on MARC commuter rail service to reach employment centers in, around and between the Baltimore and Washington, D.C. areas. It has a thriving industrial base in the western portion of the State that requires healthy, competitive rail service to reach markets throughout the United States and the world. These interests combine in a way that requires the people of this State to rely heavily on rail service. As a result, Maryland is particularly sensitive

to the issues that can be presented when mergers in the railroad industry have an impact on one or more of the many facets of its individual citizens', its communities' and its businesses' reliance on the railroad network.

The Board's current merger policy statement and rules, set forth in 49 C.F.R. Part 1180, do not provide adequately for the protection of the interests of these various public constituencies. In particular, Maryland believes that the Board should focus attention on and revise its rules with respect to: (1) commuter rail impacts; (2) rail carrier access to ports, and diversion of traffic away from U.S. ports; (3) proposed changes in train operations; (4) short line railroad operations, rights and obligations; and (5) access to competitors' rail lines.

(1) Commuter Rail Operations

Maryland, through its Mass Transit Administration ("MTA"), operates the MARC commuter rail service between Baltimore and Washington over two lines (the Penn Line, owned by and shared with Amtrak, and the Camden Line, owned by and shared with CSX Transportation, Inc. ("CSX")), and between Martinsburg, West Virginia, and Washington over CSXT's Brunswick Line. A service with growing ridership on all three lines, MARC has experienced first hand the adverse impacts that can be visited upon a commuter rail carrier when a merger produces increased traffic on the lines of the freight railroad with which it shares operations.

In the recent transaction in which CSX and Norfolk Southern Corporation ("NS") acquired and then divided the assets of Consolidated Rail Corporation ("Conrail")¹, the applicant carriers promised that MARC operations would not be

¹ *CSX Corporation, et al. - Control and Operating Leases/Agreements—Conrail, Inc., et al.*, Finance Docket No. 33388, Decision No. 89, served July 23, 1998, *slip op.* at 96.

affected, and reached an agreement with the Governor that promised to protect the service under existing agreements. When traffic, particularly on the Camden Line, increased beyond the ability of CSX to maintain the quality of its own service, the reliability of the MARC service began to suffer dramatically. That deterioration in service quality on the part of CSX remains very much in evidence today.

The Boards' existing merger regulations already nod to the existence of commuter rail operations, requiring merger applicants to submit as part of the operating plan, detail about "any impacts anticipated on . . . [commuter services operated over the lines of applicant carriers], including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations." 49 C.F.R. §1180.8(a)(2). MARC's experience demonstrates that the "public interest" requires more in the STB's regulations.

Maryland proposes the following additional requirements in these regulations:

1. The General Policy Statement on major rail consolidations (49 C.F.R. §1180.1) should be amended to make explicit that if a transaction threatens adverse impacts on commuter or other passenger rail service, it will be weighed as adverse to the public interest and may be remedied through the imposition of conditions on the Board's approval; and conversely that changes that reduce impediments to such service will be counted as a favorable factor in the public interest analysis. The Board clearly has the authority to impose such conditions today - the authority to approve mergers carries with it specifically the concomitant authority to impose conditions as may be necessary to ameliorate adverse impacts of proposed transactions. 49 U.S.C. §11324(c). However, by stating the potential for conditions to protect the public interest in the reliability and safety of

commuter rail operations, the Board will enhance the ability of commuter rail operators to preserve those operations following consummation of a merger transaction.

2. The procedural rules should be amended to require, prior to the submission of the application, that applicants consult with local commuter authorities to review the preliminary conclusions concerning the impacts or absence of impacts on commuter or other passenger service so that a dialogue can occur prior to finalization of the operating plan to avoid, to the extent possible, the need for commuter authorities to intervene as adversaries once the application is filed.
3. Post-merger remedies and dispute resolution procedures, short of formal petitions to reopen, need to be established to address service problems that were not anticipated in advance of the approval or that arise notwithstanding applicants' assurances to the contrary.

(2) **Port Interests**

Like other ports around the country, the Port of Baltimore handles an enormous volume of traffic, both domestic and international, that moves by rail either to or from the port facilities. Indeed, Maryland officials have repeatedly seen that access to competitive, efficient rail service options can play an important role in a shipper's decision whether to use a particular port for a single or for ongoing movements. The recent experience with negotiations with Maersk - Sea Land, which unfortunately did not conclude successfully from Maryland's perspective, not only emphasizes the importance of the availability of effective rail transportation, but contains the genesis of a proposal that the Board should consider in future transactions that will involve rail service to ports.

Currently, most ports like Baltimore include a web of rail lines of more than one carrier. Some piers and some of the shipper or warehouse facilities at the port enjoy direct service from more than one carrier; others are tied to only one railroad with a direct line. At most busy ports, there is not sufficient land to permit a railroad that does not already serve a particular facility to build a track into it. One reason that Maersk - Sea Land appeared to favor the New Jersey facility upon which it decided was the ready access to at least two railroads through the Shared Use arrangement agreed upon by CSX and NS in the Conrail transaction. In that reality lies the germ of one of the proposals Maryland brings forward for the Board's consideration.

To reduce congestion, enhance competition and avoid monopolization at a port facility as a result of a merger, the Board should consider adding to its rules a requirement that at any port where service by two carriers exists but does not extend to all facilities at that port, and where a merger transaction will have an impact on the port and the STB believes that competition should be enhanced,² the Board should require the railroads to create a Shared Use Area, to be operated by a neutral entity for the benefit of all railroads that reach the port (either on proprietary lines or via trackage rights, whether those rights are created in or predate the merger at issue). The Shared Use operator would have the ability to reach any pier, warehouse or other facility within the port area. In any such Shared Use Area, absent an agreement by the railroads involved as to appropriate remuneration for use of one railroad's track by another, the STB can impose a compensatory trackage rights, switching or other access fee, as well as fees to be paid to the neutral operator.

² Maryland agrees with the parties who testified at the hearings in Ex Parte No. 582 that the STB can and should use its authority to "promote and enhance, rather than merely preserve, competition." *March 31 Order* at 8.

In addition, Maryland agrees with the concerns raised by Port interests in Ex Parte No. 582 about diversions of international traffic to ports outside the United States. As part of the General Policy Statement, the STB should recognize the U.S. public interest in the preservation of multiple viable ports along both coasts and on the Great Lakes. These port facilities are essential not only for U.S. commercial interests, but for maintaining a strong defense response and supply network as well. The STB's rules should reflect that public interest by treating diversions from U.S. ports to ports in other countries as a reduction in the public benefits of the proposed transaction.

(3) Proposed Changes in Train Operations

Every community that hosts a railroad learns to become accustomed to the way that railroad runs its business. Train noise and vibrations, blocked crossings as slow moving trains enter or leave yards or shippers' facilities - - all are aspects of the railroad's operations that become part of the fabric of the life of the community. Then, along comes a merger that brings with it a change in the personnel and the *modus operandi* of the railroad. The public should not be taken by surprise by the impacts - - all impacts - - of that change.

Maryland's recent experience, again growing out of the CSX - NS - Conrail transaction, is illustrative. Before the transaction, CSX ran trains on its lines through Maryland that, for the most part, did not exceed 6,000 feet in length. Conrail, on the other hand, often ran trains that were up to 9,000 feet long. When officials from Conrail ascended to the head of the CSX operating department, train lengths on CSX lines in Maryland and in fact across the system, began to increase. This presents a problem. Sidings, lead in tracks and other facilities were built to accommodate shorter trains. Lack of facilities to hold the longer trains has led to congestion on

some lines and has caused delays to commuter operations where the MARC train has to take a siding because the freight is too long. Where lead in tracks are too short to hold trains awaiting entrance to a yard, blocked crossings have resulted. Other similar delays have proliferated. This change has had ramifications across the CSX system, leading to congestion on lines and in yards far outside Maryland. Those problems out of the State, however, have impacts that have reached into the State, creating or compounding the operating difficulties encountered on CSX lines within Maryland's borders. Shippers have encountered serious reductions in reliability of service. Short lines have experienced delays in connections, thus reducing their ability to provide reliable service commitments to their own customers. Commuters, as noted previously, have suffered through repeated delays on Camden and Brunswick line trains.

Both the Operating Plan requirements (49 C.F.R. §1180.8) and the Environmental Regulations (49 C.F.R. §1105.7) mandate the inclusion of some information about changes to train operations. However, changes of the type described here are not covered by those rules, and they should be. Merging railroads should be required to report on each parties' current train operating guidelines or practices regarding train length, and any changes to those guidelines or practices that may be part of the plan for handling increased traffic volumes or to otherwise improve efficiency on the merging carriers. If there is any projection of increased train lengths, the parties should also be required to report on plans for increasing lengths of sidings, plans for adjusting signal systems as necessary to account for the longer trains, plans for avoiding blocked crossings at any location where increasing the length of time the crossing is blocked will have an adverse effect on public safety or on the commercial

interests affected by reduced access to their facilities, and any other changes that can be made to allow the system to handle the longer trains.

Moreover, Maryland's experience after the CSX-NS-Conrail merger demonstrates that unforeseen changes in train operations may require remediation after the merger has been consummated. Communities along the former or current CSX and NS lines in the state are seeing increases in train frequencies throughout the day and night that are increasing noise pollution from the trains themselves as well as from crossing protection devices. Increased traffic volumes are causing the railroads to hold trains in towns or on lines where neighbors are facing new and troublesome noise and exhaust pollution that had not been predicted in the applicants' Operating Plan or environmental documentation.

The STB's rules should specifically recognize the Board's authority to require merging carriers to make capital improvements required to address operating impacts from such changes, including but not limited to siding extensions or new construction altogether, signal changes, or any other facility improvement that will reduce the adverse impacts of the operating change on the public safety and the reliability of service to the public. This authority to order capital improvements to remediate the effects of a transaction should extend to post-consummation effects that were not anticipated at the time that the application was prepared.

(4) Short Line Operations

Maryland is proud of the short line railroads located within the State that provide valuable services to shippers and communities that have faced loss of service altogether following mergers, abandonments, or other rationalization of a rail carrier's services. The State's short line railroads include:

Maryland Midland Railway, Inc.
Maryland and Delaware Railroad Company

Winchester & Western Railroad Company
Patapsco & Back River Railroad
Canton Railroad Company
Wheeling & Lake Erie Railway Company (Trackage rights only)
Eastern Shore Railroad, Inc.

In the *March 31 Order* this Board acknowledged the concerns of the short line and regional railroads across the country, *slip op.* at 8, and asked for comments on whether and how their concerns should be reflected in the merger rules. Maryland's short line operators, as noted previously, have experienced first hand the issues that can be created following a merger, and the State believes that the rights articulated in the proposed "Bill of Rights" advocated by the American Short Line and Regional Railroad Association, are essential for the survival of this segment of the railroad industry. Maryland joins the Association in requesting the inclusion of these "rights" in the STB's merger policy and regulations as a way of preserving and protecting the public's interest in the continued growth and vitality of the short line railroads that serve the State.

(5) Access to Competitors' Lines

Maryland is aware of the increasing expressions of frustration by shippers over lack of meaningful competition between rail carriers at many locations, and of the increasing clamor among shipper interests for open access by rail carriers' to competitors' lines. The State takes no position at this time on the requests for completely open access at all locations that have been advanced in Ex Parte No. 582, in other proceedings at this Board and in other venues. Review of shippers' experiences, however, leads the State to question whether requiring a showing of anti-competitive behavior on the part of a carrier that has sole access to a shipper in a particular location should be the *sine qua non* of a determination of whether to mandate access by another railroad. Growing complaints from shippers around this

State and around the country who now have service from only one railroad suggest that diminishing service quality at such locations results too frequently when there is no direct rail service competitive option available. At these locations, the single carrier is not acting in an anti-competitive way, that is, it is not taking any action to preclude competition. The monopoly already exists. The monopolist is simply taking advantage of its monopoly power to the disadvantage of the shipper at the particular location.

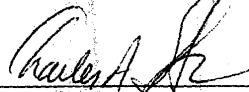
While not taking any position on the merits of remedies shipper interests and others have sought, Maryland supports wholeheartedly the need for an inquiry into carriers' practices, shippers' experiences and possible solutions. In undertaking such an inquiry into solutions to the problems experienced by shippers at locations with only one serving carrier, this Board should review carefully the assertions of the need for competitive rail service alternatives in order to maintain quality of service by a rail carrier that already serves a shipper or a port facility. At the same time, however, the STB should focus carefully as well on the need for ensuring that any carrier whose lines or facilities are to be used by another must receive appropriate compensation for the use of its assets.

CONCLUSION

The State of Maryland commends the STB for undertaking this careful examination of its merger policy, guidelines and procedures, and appreciates the opportunity to comment on matters that are of serious concern to the people and the businesses in this State. Difficult encounters with the aftermath of the CSX - NS - Conrail merger have demonstrated to Maryland that in order for the STB to guard the interests of all elements of the shipping and commuting public, the existing information requirements and remedies set forth in the Board's regulations need expansion and clarification. Adoption of the proposals set forth here will enhance the

STB's ability to fulfill its mandate of protecting the public interest, and the State of Maryland respectfully requests the Board to incorporate these proposals into any revision of the rules in 49 C.F.R. Part 1180 that may result from this proceeding.

Respectfully submitted,



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Dated: May 16, 2000